No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

RUSSELL K. LAMBEAU,
649 South Olive Street,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee's Statement of the Case.

Attempting to condense 17 pages of the printed transcript of record into three and one-half pages of their brief, counsel have achieved brevity at the expense of accuracy. The law makes one answerable for what he insinuates as well as for what he states explicitly. (*Bates v. Campbell,* 213 Cal. 438, 442, 2 P. 2d 791.) Appellee's partial review of the complaint omits such things as the doubt implanted by the offending letter as to Mr. Pond's loyalty, honesty, competence and ability to get along with people. Appellee's statement is neither complete, nor accurate, nor fair.

Complete Silence Is Not Our Problem.

Appellee has taken great pains to ferret out what it says is the only reported case holding that an employer has a legal right to remain silent. The cited case of *New York, Chicago & St. Louis R.R. Co. v. Schaffer,* 65 Ohio St. 414, 62 N. E. 1036, was a case in which the defendant railway company refused to give the plaintiff, a brakeman whom it had discharged, a statement or certificate of his service for the company. The Ohio court held that such refusal was not actionable.

But in the instant case we are not concerned with what would have been the law applicable if I.G.E. had refused to answer the letters of inquiry. Appellee purported to answer the inquiries, but in such a manner as to cast doubt upon the genuineness of its letter of reference addressed to plaintiff [Ex. A, Tr. pp. 15-18]. Having undertaken to answer the inquiries, appellee was legally bound to answer forthrightly and in accordance with facts well known to it.

Moreover, G.E. was legally bound to refrain from using language which, when read in conjunction with the letters of inquiry and the reference letter [Ex. A], would indicate that G.E.'s information concerning Pond rendered him not worthy of recommendation. Emphasis to this postulate must be added when the subject of inquiry concerns "what jobs held," or such basic attributes as loyalty, competence, integrity, or ability to get along with people. Any employer knowing an employee for even 17 short *months* would have ready responses to such inquiries. *The vice of the letter is multiplied by the background of 17 years of faithful service and by the absence of any information in G.E.'s files to justify their negative reply.* [Complaint, pars. IV and XIII.]

If a prospective employer inquires about a man's honesty or loyalty and the prior employer says, "I am unable to give first hand information. I don't want him back," is not that language equivalent to saying that the prior employer means, "I would not care to recommend him as to his honesty or loyalty from my experience with him"? Can an employee with an unblemished record be without redress against the prior employer who so defames him?

If a man's competence is the subject of inquiry and the reply covers the better part of a printed page of details not responsive and not solicited and this same reply pointedly ignores the matter of competence, can a favorable inference be drawn? Now add the gratuitous statement that the employee would not be rehired on the basis of his record, and there can be no reasonable doubt as to the writer's meaning. The foregoing more than satisfies the plaintiff's burden. He only need show that the defamatory meaning was *possible*. (*Baker v. Warner,* 231 U. S. 588, 594, 34 S. Ct. 175, 58 L. Ed. 384.) By their silence counsel have conceded the impregnability of the principles enunciated in the *Baker* case.

The four employers asked a total of 23 specific inquiries (Appellant's Op. Br. pp. 8-9). Only one question was answered by G.E. and that one was not asked by three of the four inquirers. Counsel admit the single matter selected for reply would not help the applicant in getting the positions he sought (p. 9).

Is that an "exact supplement to the service letter"?

Is that "precisely what the inquirers wanted to know"?

Is that a "truthful and accurate answer" to the 23 subjects inquired about in a "common sense manner"? (Appellee's Br. p. 13).

They say they gave the bad along with the good. What good?

G.E. suggests Exhibit B was a "supplement" to the letter addressed to Mr. Pond. What is a supplement? Is it a straw to be grasped? Can a supplement add to an unrecognized, unidentified antecedent? Can we have a footnote without a text?

Exhibit A was addressed to Mr. Pond. Without verification, it could be no more than a "To Whom It May Concern" letter. The most incautious employer of menial domestic help would check the purported source. *A fortiori* the claim of previous employment as Chief Engineer would not be accepted without question. The most routine procedure would demand a test of the sincerity and authenticity of Exhibit A. Moreover, the very language of the inquiries proves that specific verification was desired. Otherwise, competence, ability to get along with people, jobs held, would have been needless repetition of what Exhibit A had already covered in impeccable fashion.

If "the service letter was inadequate in but one respect" (Appellee's Br. p. 12), **did three of the four employers lack the intelligence and ability to articulate their curiosity in that one respect? And why, then, did the fourth employer list ten other matters of specific interest to him? [Tr. p. 13; 1st par. 4th Cause of Action].**

An unqualified denial by G.E. of the genuineness of Exhibit A might possibly have been a more candid method of branding the document as counterfeit. Outright denial could not have been more effective. All four recipients understood the intended repudiation. *All four, in fact, refused employment to Mr. Pond by reason thereof.* The meaning derived by the reader is an element to be proved

where the libel is not *per se*. See authorities cited by appellant at pages 4 and 5 of his opening brief.

Appellee hopes that a tacit recognition of the letter of recommendation [Ex. A] is to be found in the language of Exhibit B. The grudging mention of appellant's 17 years of service is the slender thread upon which the hope is hung, only to be severed by disagreement with *the name* of the company which initially hired Mr. Pond, *the time* of his arrival in the United States and *the circumstances* of his resignation.

The circumstances of Mr. Pond's resignation are stated in Exhibit A to have been based upon Mr. Pond's "belief that his prospects with the Company were unsatisfactory." To Mr. Pond's obvious disadvantage Exhibit B slyly alters the above stated cause of his resignation to "mutual agreement."

The reason for the absence of any favorable reference in Exhibit B in contrast to the commendatory tone of Exhibit A is made crystal clear by the final sentence, a death sentence to any hopes plaintiff may have nurtured for the positions he sought.

With italics appellee says [p. 9] the statements as to ineligibility for re-engagement and the resignation by mutual agreement were not alleged to be false. Paragraph XIII [Tr. pp. 9-10] answers that contention. It embraces the tenor of the entire reply letter and alleges that the same was unjustified and that *there was nothing pertaining to plaintiff's service justifying the same, nor did defendant have any reasonable grounds to believe that plaintiff's record or qualifications were other than satisfactory.*

In dealing with the element of malice, the brief of appellee (p. 11) offers a theory that there is a distinction

between malice in the mind of the writer (allegedly not actionable) and malice as expressed in the publication. **The theory is at variance with decisions of the California Supreme Court.** In *Childers v. Mercury Printing and Pub. Co,.* 105 Cal. 284, 288, 38 Pac. 903, it is stated "malice in fact may be defined as a spiteful or rancorous disposition which causes an act to be done for mischief." The opinion continues stating that malice may be established by evidence *aliunde* or it may appear from the face of the publication itself.

The reference by counsel to *Morcom v. San Francisco Shopping News,* 4 Cal. App. 2d 284, 40 P. 2d 940, is meaningless. In that case the lower court was reversed for sustaining a demurrer where the complaint showed the existence of a conditional privilege coupled with a direct allegation of malice. The defamatory matter did not show upon its face that it could not have been published maliciously by defendant. The higher court said "it cannot be said with reason, that they (the articles complained of) carry, in themselves a refutation of the direct allegation of actual malice found in the complaint." *The Morcom case supports appellant.*

G.E. says (p. 11) that the question for the court to determine is two-fold. A more accurate statement of the first phase of the question is: Were there in the reply letters any materially false statements either in the plain context or reasonably inferred therefrom by the reader in the light of the extrinsic circumstances surrounding the writing of the letter? **A defendant is liable for what is insinuated, as well as for what is stated explicitly. Bates v. Campbell, 213 Cal. 438, 2 P. 2d 383.**

A correct statement of the second aspect of the two-fold question is whether malice is properly alleged. Malice

and privilege cannot co-exist. (*Brewer v. Second Baptist Church,* 32 Cal. 2d 791, 197 P. 2d 713.) Malice is inferred where malice *per se* is involved; otherwise malice must be alleged and proved. It is idle to discuss inferring malice from a document admittedly not libelous *per se.* The complaint alleges malice [Tr. pp. 7, 10; pars. X and XV] as approved in *Washer v. Bank of America,* 21 Cal. 2d 822, 831, 136 P. 2d 297.

The gist or sting of the letter sued upon is *not* as stated by appellee (Br. p. 9). The gist or sting was the negation of the authenticity of Exhibit A, the unjustified and false reflection upon appellant's loyalty, his competence, his honesty etc.

Would counsel have the Court hold that it is too heavy a burden to require the personnel department of one of the largest corporations in the United States to answer specific inquiries of the type asked by the four employers herein by giving the routine rating of "good," "average," "poor," "occasionally," or "infrequently," and to add under "remarks" or "comment" a verification, denial or photostatic reproduction of Exhibit A? The Court may take judicial notice that any other small, medium or large corporation treats such replies as a reciprocal duty owed to another as a matter of course.

Why, but intentionally and maliciously to interfere with the livelihood of a man with but 22 years of life expectancy, did appellee refuse to report the simple answers which had to be commendatory if given in line with Mr. Pond's record.

The Opinion Myth.

Does the unfounded assertion of an opinion enjoy greater latitude in the field of conditional privilege than does the assertion of any other incorrect fact? Counsel righteously stands for the freedom to express an opinion. Thus the wielder of a poison pen could take asylum behind the opaque mantle of his unfounded belief. But the law does not permit the dissemination of any fact which the publisher has no reasonable grounds to believe to be true. The statement of an opinion not founded upon any fact must have the same vulnerability as any other false statement. Restatement, Torts, Vol. 3, Secs. 599-601. Section 601 thereof under "Comment" states:

> "a. Except as stated in Sec. 602, (here inapplicable) one who on a conditionally privileged occasion makes defamatory statements about another, having no reasonable grounds to believe them to be true, is not given the protection the occasion will otherwise afford if the matter turns out to be false. This is so although the publisher honestly believes the statements to be true. The negligence of the publisher in making the unqualified statements of fact without knowledge of circumstances which would lead a reasonable man to believe them to be true, is an abuse of the occasion."

In belaboring the unlikelihood of Mentzer's having first hand information of an employee in Mr. Pond's situation (p. 22) counsel begs the question. Why would personnel records be kept if such letters of inquiry required only *first hand information?* Would a personnel specialist in a company the size of G.E. *ever* have first hand information? Must all employees not personally known to the

personnel specialist have their service records distorted by the mischance that the specialist is not disposed to confirm or report correctly a record kept in the usual course of business? By what right did Mentzer assume that a letter addressed to International General Electric Co. (not even his employer) required the reply of a G.E. employee based on his own personal knowledge? Moreover, all of Mr. Pond's immediate superiors in appellee's affiliates were alive [Tr. p. 5]; had Mentzer been sincere in his thirst for first hand knowledge, he needed only to pick up his telephone.

Counsel Flouts Appellate Rules.

In the fourth paragraph, page 8 of its brief, appellee finds the record intolerably confining. No longer need counsel apply to the court for authority or permission to augment the record. Self-help is the order of the day for G.E. counsel. One simply throws into one's brief any extraneous matter desired. The immediate urge of one so affronted is to strike back in kind, but years of disciplined adherence to prescribed procedures for officers of the court permit only this notice.

Law Cited by Appellee.

Counsel devote nine pages of their brief (pp. 13-22) to demonstrating what was stated by appellant in his brief at the bottom of page 3 and the top of page 4, *i.e., that the innuendo and the inducement are two separate things.* Innuendo cannot be any broader than the words themselves. In stating this proposition, many cases stop there with the discussion and fail to take into account that there is such a thing as inducement. This is true of all the cases selected by counsel except one, *Vedovi v. Watson & Taylor,* 104 Cal. App. 80, 285 Pac. 418. By the inducement, extrinsic facts may show that something was meant en-

tirely different from the natural import of the words. The controlling test is not as counsel contends, "what is the common meaning of the words used as they would be understood by the average person?" Under such a rule where would there be any room for a hidden or covert meaning? The inducement supplies the extrinsic facts which enable the reader to put himself into the shoes of the recipient of the defamatory matter. The inducement renders untenable the naive approach of counsel that the offending letter must be accepted at face value in its ordinary meaning. The inducement is used only where libel *per se* is not involved. It shows the reason for the unusual or hidden meaning alleged by plaintiff and so understood, in fact, by the recipient. **Decisions which use inducement and innuendo interchangeably are ill considered and do not correctly apply the principles of the law of libel.**

In *Vedovi v. Watson & Taylor,* 104 Cal. 80, 285 Pac. 418, the court says at page 85 "To constitute a libel, it is not necessary that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied; and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts (inducement. colloquium and innuendo) to show its meaning. . . . Where the words are actionable in themselves there is no occasion for inducement to be alleged, but where the words are not actionable they may be made so by inducement."

Conclusion.

Mr. Pond was not asking for reemployment by General Electric Company. He was merely seeking the opportunity in California of continuing in his chosen profession in order to support himself and his famlly compatibly with the station in life he had so laboriously attained after 17 years in the I.G.E. family.

The complaint states a claim. It presents a classic case for the application and enforcement of the principles of libel. Appellant should not be denied his day in court.

Respectfully submitted,

Russell K. Lambeau,

Attorney for Appellant.